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NO. 88-634

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

BONNIE KRUGMAN,

Petitioner,

vs.

PALMER COLLEGE OF CHIROPRACTIC,
WARREN RHODES, D.C., and
PATRICK T. KEEFE, D.C.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
FROM THE SUPREME COURT OF IOWA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1. Bonnie Krugman v. Palmer College of Chiropractic, Warren Rhodes, and Patrick T. Keefe, Iowa District Court Law No. 66572, filed April 28, 1986.

2. Bonnie Krugman v. Palmer College of Chiropractic, Warren Rhodes and Patrick T. Keefe, Iowa District Court Law No. 66572, filed May 27, 1986.

3. Bonnie Krugman v. Palmer College of Chiropractic, Warren Rhodes and Patrick T. Keefe, No. 86-896, slip op. (Court of Appeals of Iowa, November 30, 1987).

4. Bonnie Krugman v. Palmer College of Chiropractic, Warren Rhodes and Patrick T. Keefe, 422 NW2d 470 (Iowa 1988).

RULE INVOLVED

Iowa Rule of Civil Procedure (134(b)(2)(C) quoted in pertinent part in Petition for Writ of Certiorari, p. 4.

STATEMENT OF THE CASE

COURSE OF THE PROCEEDINGS -- For the sake of brevity as required by Supreme Court Rule 22.2 and accuracy, Respondents adopt as if fully set forth herein the facts as found by the State District Court and Iowa Supreme Court as set forth on App. pages 23-42 and 168-177. Alternatively, see also Krugman v. Palmer College of Chiropractic, 442 NW2d 470 (Iowa 1988).

CONSTITUTIONAL CLAIM NOT RAISED BEFORE TRIAL COURT -- The State District Court Order dismissing the action as a sanction, and the Ruling on Motion to Vacate Dismissal Order make no mention of the Fourteenth Amendment Due Process Clause. (App. 168-177, 178-179). Krugman's counsel admitted that a decision in Krugman's favor in this abuse of discretion case "is not based on nor did it require a finding of a constitutional violation." (App. 144-145). Hence, Iowa Supreme Court opinion makes no mention of the Fourteenth Amendment Due Process Clause (App. 23-42).

REASONS FOR DENIAL OF THE WRIT

I. THE IOWA SUPREME COURT'S DECISION THAT A STATE TRIAL COURT DID NOT ABUSE ITS DISCRETION SHOULD NOT BE REVIEWED BY THIS COURT.

Supreme Court Rule 17 provides that review of a Writ of Certiorari is discretionary, and will be granted only when there are special and important reasons. That same Rule specifies the type of state court rulings which this court considers in exercising its discretion. This Iowa Supreme Court decision falls far outside of any of the considerations in Rule 17.

In abuse of discretion cases, it is not the role of the United States Supreme Court, just as it was not the role of the Iowa Supreme Court, to determine whether or not either of them would, as an original matter, have dismissed this action. The issue is whether the Scott County District Court abused its discretion in so doing. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976); (App. 36).

The Petition for Writ of Certiorari, which includes an appendix, is incomplete since it omits the April 28, 1986 District Court Order dismissing the litigation as a sanction. That Order and a subsequent Ruling denying a Motion to Vacate are attached and numbered as App. 168-179.

In the review of abuse of discretion cases, the U.S. Supreme Court has cautioned that it is a natural tendency on the part of reviewing courts, properly employing hindsight, to be heavily influenced by the severity of outright dismissal as a sanction. National Hockey League

v. Metropolitan Hockey Club, Inc., 427 U.S. at 642. But, in such cases, as in other areas of the law, the most severe of sanctions provided by statute or rule must be available to district courts in proper cases. The imposition of sanctions is not merely to penalize those whose conduct may be deemed to warrant such a sanction, but also to deter those who might be tempted to such conduct in the absence of such a deterrent. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. at 643. (App. 169).

The Petition for Writ of Certiorari rises and falls upon a faulty premise. It is argued that the district court dismissed the case "because plaintiff's counsel was unavailable due to another trial commitment." (Petition 19, 21, 23). Quite the contrary, the district court held:

> "Attorney O'Malley has argued in the Continuance Motion and the Reconsideration Motion that his unavailability due to an Illinois court trial should excuse his conduct. The Court rejects this claim. It is clear that even if Mr. O'Malley was present this case is not ready for trial."

(App. 175).

The district court summarized its factual findings in the following unambiguous language:

> "Judge Briles' findings that plaintiff never intended to be ready for trial, and plaintiff's counsel's actions have been a deliberate ploy to avoid trial have been confirmed, and unmistakably established once again on the morning set for trial. The

> totality of the record establishes willfulness, bad faith, fault and gross neglect all to the prejudice of Palmer College, Warren Rhodes and Patrick Keefe. Plaintiff and her counsel have flagrantly disregarded the rules of discovery, specific court orders, and the rules of practice and procedure of the Seventh Judicial District."

(App. 175)

The Iowa Supreme Court agreed with the district court's analysis:

> "Understandably, the trial court focused upon attorney O'Malley's conduct in failing to adequately prepare the case for trial to facilitate its disposition." (App. 38).

Iowa's highest court found that there was no abuse of discretion by the Scott County District Court. (App. 24, 37, 39 and 42). The Iowa Supreme Court painstakingly examined the record from Krugman's chiropractic care and treatment on September 3, 1980 through the trial date of April 28, 1986. (App. 24-35). Based upon that record, the Iowa Supreme Court found that Krugman's attorney "willfully did not comply with" three court orders; "the fault here lies with attorney O'Malley"; and "there is a long record of procrastination and inattentiveness on O'Malley's part in this case." (App. 39) (underlining supplied).

The Iowa Supreme Court properly performed its appellate function, and found no abuse of discretion by the District Court. Krugman now requests that this Court second guess the Iowa court on this simple abuse of discretion issue.

Krugman has availed herself of every legal remedy available in the Iowa court system. Iowa's highest court rejected her arguments. A case of this nature does not merit further review by the U. S. Supreme Court.

II. THE 14TH AMENDMENT DUE PROCESS CLAUSE DOES NOT PROVIDE A BASIS FOR THE PETITION FOR WRIT OF CERTIORARI.

All counsel agreed that this case would be tried on April 28, 1986. (App. 27, 168). The trial date arrived. The jury was present and waiting. (App. 35, 168). The Defendants Palmer College of Chiropractic, Patrick T. Keefe and Warren Rhodes were personally present, represented by their counsel, and prepared for trial. (App. 35, 168-169). Plaintiff Bonnie Krugman was not present. (App 35, 169). Plaintiff's counsel appeared but was not prepared to try to the case. (App. 35, 168-169).

The Iowa Supreme Court recreated the scene as it unfolded before the eyes of the trial judge:

> "On the date of trial, this action was over three and one-half years old, and the trial court was faced with the choice of either continuing or dismissing the case. Understandably, the trial court focused upon attorney O'Malley's conduct in failing to adequately prepare the case for trial to facilitate its disposition.
>
> We agree with the trial court that the fault here lies with attorney O'Malley."

(App. 38-39).

Krugman had her day in court. Her lawyers failed

to try the case. There was no claim at the trial court level that her due process rights had been violated. The record reveals that Attorney O'Malley in a post trial motion was simply relying upon two rules of state civil procedure, and not upon any constitutional provision. (App. 69-71; 178-179). Hence, any constitutional issue has been waived. State v. Williams, 285 NW2d 248, 269 (Iowa 1979) cert. den., 446 U.S. 921 (1980); State v. Rinehart, 283 NW2d 319, 324 (Iowa 1979), cert. den., 444 U.S. 1088 (1980).

After denial of the post trial motion, an appeal was filed and submitted to the Iowa Court of Appeals. That intermediate appellate court found an abuse of discretion. (App. 1-21).

Palmer College, Rhodes, and Keefe applied for further review to the Iowa Supreme Court. In resistance to that application, Attorney O'Malley characterized the Iowa Court of Appeals' Decision in these words:

> "The opinion finding an abuse of discretion applies to the unique facts of this case and is amply supported by Iowa case law. (Citations, supra).
>
> It is equally clear that the Appellate Court's decision is not based on nor did it require a finding of a constitutional violation."

(App. 144-145)(underlining supplied).

Since that admission by Attorney O'Malley, the Iowa Supreme Court vacated the decision of the Iowa Court of Appeals, and affirmed the district court judgment. (App. 42). Now magically arising like a phoenix from the ashes of the Iowa Supreme Court decision O'Malley argues that Krugman's due process rights were violated. (Petition

i, 4, 17, 22, 23).

The constitutional argument is nothing more than a last ditch plea to extricate Attorney O'Malley from his own malpractice. This Court (in a case cited by the Iowa Supreme Court) has addressed the issue in a factual setting very similar to the instant case:

> "..., a civil plaintiff may be deprived of his claim if he failed to see to it that his lawyer acted with dispatch in the prosecution of his lawsuit. And if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. But keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant. Moreover, this Court's own practice is in keeping with this general principle. For example, if counsel files a petition for certiorari out of time, we attribute the delay to the petitioner and do not request an explanation from the petitioner before acting on the petition."

Link v. Wabash Railroad Co., 370 U.S. 626, 634n10 (1962); (App. 42); (underlining supplied to show emphasis in original).

The dismissal as a sanction in this case is no different than a state court judge granting a motion for summary judgment or a motion to dismiss when the non-moving party fails to file a resistance. In the instant case, Krugman's lawyers failed to try the case on its merits on an agreed trial date because they were not prepared for

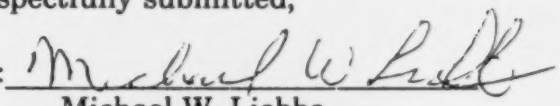
trial. (App. 32-33, 35, 38, 39-40, 168, 171, 172-173, 175).

The predicament in which Krugman's attorneys found themselves is one of their own making. (App. 39). The Iowa courts provided Krugman with all the legal process to which she was due.

CONCLUSION

For the above enumerated reasons, the Writ of Certiorari should be denied.

Respectfully submitted,

By: 

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APPENDIX

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR SCOTT COUNTY

BONNIE KRUGMAN,

Plaintiff,

v.

PALMER COLLEGE OF CHIROPRACTIC, WARREN RHODES, and PATRICK T. KEEFE,

Defendants.

Law No. 66572

ORDER

FILED

1986 APR 28 PM 2:14

MARLENE K. NELSON
CLERK OF DISTRICT COURT
SCOTT COUNTY, IOWA

This litigation was commenced by the filing of a Petition on September 1, 1982 concerning chiropractic care received by the Plaintiff on September 3, 1980. This case was placed on the strike list under Iowa Rule of Civil Procedure 215.1. Plaintiff filed a trial certificate on September 16, 1985 representing to the Court that she would be ready for trial by January 10, 1986. Their certificate was filed over three years after the Petition was filed, and over five year (sic) after the event which is the subject matter of this litigation. A trial setting conference was held on October 22, 1985 in which a settlement conference was set for April 10, 1986 at 2:00 o'clock p.m., and a trial was scheduled for April 28, 1986 at 9:00 o'clock a.m. by stipulation of counsel. A trial setting conference memorandum was signed by the Court reflecting that this case is continued, and shall not be stricken under Rule 215.1.

The trial date has arrived. The jury was present and waiting. The Court called the case for trial. Plaintiff is not prepared to try this case. The remaining Defendants Palmer

College of Chiropractic, Patrick T. Keefe, and Warren Rhodes (a resident of Mississippi) are personally present, represented by their counsel, and prepared for trial. Palmer College is present by its President J. F. McAndrews and its Vice President for Academic Affairs, R. Douglas Baker. Plaintiff Bonnie Krugman was not present. The law firm of Winstein, Kavensky, Wallace and Doughty by Allan Hartsock appeared as counsel for Plaintiff.

The Court had before it for ruling motions for sanctions requesting, inter alia, dismissal of Plaintiff's Petition. The Court, having painstakingly reviewed the file in its entirety, considered the arguments of counsel, and being fully advised finds the sanctions sought are appropriate. The sanctions to be applied do not involve merely the rights of Bonnie Krugman. The sanctions involve the rights of all parties to an expeditious and orderly disposition of the case. It implicates the public interest and concern about undue delay of litigation. Finally, it concerns respect for and compliance with Court orders. Sanctions ensure that a party will not be allowed to profit from the failure to comply with Court rulings. Sanctions must be exercised in this case not merely to penalize those whose conduct may be deemed to warrant sanctions imposed but to deter those who might be tempted to such conduct in the absence of such a deterrent. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643, 96 S Ct. 2778, 49 L Ed 2d 747, 751 (1976).

There have been a flurry of motions filed since Palmer College on March 21, 1986 filed a Motion to Compel Supplemental Answers to Interrogatories, and to exclude Certain Identified Expert Witnesses. These motions include Defendants' Motions for Sanctions to Exclude Expert

Witnesses, Plaintiff's Application to Continue Trial, and Plaintiff's Reconsideration of Application for Continuance of Trial Setting and for Extension of Time to Complete Discovery. Court hearings have been conducted, and Orders issued April 1, 1986, April 9, 1986 and April 21, 1986.

These pleadings and Court Orders clearly show that the present circumstances in which Plaintiff and her counsel find themselves stem back to 1982, the year in which this case was filed. By proof of service dated October 28, 1982 Palmer College mailed its first set of interrogatories to Plaintiff. Those interrogatories sought information relating to expert witnesses and damages. The interrogatory answers served on December 16, 1982 provided in part that no expert had been engaged as yet for the purpose of testifying at trial and that the Plaintiff's investigation continued.

The Court file reflects that the Plaintiffs failure to have expert testimony was brought to the Court's attention nearly three years ago:

> "In May of 1983, the battle over who are plaintiff's experts and when is plaintiff going to get an expert appeared to the attention of the Court, and at that time plaintiff had no experts. The Court ruled that the plaintiff did not have to answer the interrogatories further with respect to plaintiff's experts, and that plaintiff should not file a trial certificate until the plaintiff had secured an expert and an opinion from said expert and had completed sworn answers to certain interrogatories pertaining to that testimony. It appears to the Court that on July 2, 1984, the plaintiff for the first time, designated an expert, one Dr. Neil Allen. It then appears that there were problems

> concerning efforts on the part of the defendant to take the deposition of Dr. Allen, and the assistance of the Court was sought."
>
> COURT ORDER filed April 9, 1986, p. 1.

This court is faced with a trial certificate filed by Plaintiff on September 16, 1985 that represents that Plaintiff will be ready for trial by January 10, 1986. It is obvious the trial certificate was only filed to take this case off the strike list. Since the filing of the trial certificate seven months ago, there is no showing of any action by the Plaintiff to have this case prepared for trial.

The defendants have done just the exact opposite.

> "In view of the remarkable lack of activity on the part of the plaintiff, the defendants procured a pretrial conference to be held in this case in January of 1986, primarily for the purpose of setting dates by which discovery should be completed, for closing pleadings, and for listing of expert witnesses. The order resulting from that conference recites that counsel of record for all parties agreed on the dates set out in the order, and the order itself provided that the dates would not be extended except upon showing of good cause. The very first item on the list was the listing of all expert witnesses the plaintiff intended to call on or before February 28, 1986."
>
> COURT ORDER filed April 21, 1986, p.2.

Following the entry of this January 28, 1986 Order, the defendants have continued to diligently prepare for this trial.

The Court has ruled upon a Motion to Compel, a Motion for Sanctions, and a Motion for Summary Judgment filed by the Defendants. The Court has ruled upon a Motion to Continue and a Motion to Reconsider filed by Plaintiff.

The Court in ruling on these motions has made the following findings concerning the actions of Plaintiff's counsel:

> "All fault and neglect in this case has been by plaintiff."
>
> COURT ORDER filed April 9, 1986, p. 3.
>
> ". . . the plaintiff never intended to be ready for trial on the 28th of April, 1986."
>
> COURT ORDER filed April 9, 1986, p. 3.
>
> "The plaintiff has taken no move to take evidentiary deposition of her own experts, although her attorney advises that he does plan to present the testimony of some, if not all of them, by evidentiary deposition. It is clear that the attorney for the plaintiff has known since February that he was planning to use these doctors. The failure to file the answers to the interrogatories designating these persons as experts and supplying the other information required appears to have been a deliberate ploy to avoid the trial date which had been set October 22, 1985."
>
> COURT ORDER filed April 9, 1986, p. 3-4.
>
> ". . . competent trial counsel from Rock Island, Illinois, members of whom are qualified to practice law in the State of Iowa, have appeared in this case since its inception."

COURT ORDER filed April 9, 1986, p. 4.

"Plaintiff's counsel has not advised the Court that there are not other persons in his law firm who could try one or the other of these cases, . . ."

COURT ORDER filed April 9, 1986, p. 4.

". . . the interrogatory has never been supplemented under oath, and therefore stands as a failure to answer the interrogatory."

COURT ORDER filed April 21, 1986, p.2.

". . . no steps whatsoever were taken by the plaintiff to make those witnesses available for immediate depositions."

COURT ORDER filed April 21, 1986, p. 3.

"The Court also notes that plaintiff's attorney does not advise the Court candidly when he is in trouble. He waits till the very last minute, and then springs these surprises and asks for the Court to allow him once more to continue the case. He has never yet met a deadline to which plaintiff's counsel has agreed, and as previously written, it is clear that up until this time, he never intended to. The Court has no basis to believe that either the Court or the defendants will be treated in any better fashion in the future."

COURT ORDER filed April 21, 1986, p. 3-4.

> "No excuse is shown as to why the plaintiff has not made her experts available for discovery depositions. There are other attorneys who could have been present at the discovery depositions."
>
> COURT ORDER filed April 21, 1986, p.4.

This Court adopts the above findings as the findings of this Court. With this record having been established, this case was assigned for trial before the undersigned. The Defendants have filed two motions for sanctions on April 22 and April 25 requesting that the Court dismiss Plaintiff's Petition for failing to comply with discovery rules and Court orders. In ruling upon these sanction motions the Court finds that Plaintiff has with impunity violated Court Orders.

(A) Plaintiff has failed to comply with the January 28, 1986 Rule 136 Order.

(B) Plaintiff has violated the April 1, 1986 Order requiring and directing the filing of supplemental answers to interrogatories.

(C) Plaintiff has violated the April 1, 1986 Order by failing to make these experts available for depositions.

(D) Plaintiff's counsel forced the cancellation of the settlement conference to be held on April 10, 1986. This conference had been scheduled since October 22, 1985.

(E) Plaintiff has violated the April 9, 1986 Order by failing to file settlement conference documents under District Court Rule 7.1B. Plaintiff has not filed an exhibit list, pretrial brief, proposed jury instructions, or the negligence action check list including a detailed itemization of damages.

In contrast Defendants have fully complied with

settlement conference documents. Defendants have also filed motions in limine and under Iowa Rule of Evidence 104. Defendants have made themselves available to take the depositions of Plaintiff's experts, and have on record agreed to make their experts available.

Judge Briles findings that plaintiff never intended to be ready for trial, and plaintiff's counsel's actions have been a deliberate ploy to avoid trial have been confirmed, and unmistakably established once again on the morning set for trial. The totality of the record establishes willfulness, bad faith, fault and gross neglect all to the prejudice of Palmer College, Warren Rhodes and Patrick Keefe. Plaintiff and her counsel have flagrantly disregarded the rules of discovery, specific Court Orders, and the rules of practice and procedure of the Seventh Judicial District.

Attorney O'Malley has argued in the Continuance Motion and the Reconsideration Motion that his unavailability due to an Illinois Court trial should excuse his conduct. The Court rejects this claim. It is clear that even if Mr. O'Malley was present the case is not ready for trial.

The fact that a Motion for Continuance was filed on April 8, 1986 and denied on April 9, 1986 makes it obvious that the trial nineteen days away must be prepared for with all due diligence. Despite this clear signal the Plaintiff has made the situation intolerable by violating Court Orders and thereby hindering the Defendants in the preparation of their case.

The Plaintiff is not prepared to try this case. As part of the trial proceedings the Plaintiff was ordered to make her experts Dr. Kaplan, Dr. Quinlan, and Dr. Ward available for discovery depositions at this trial setting. That Order does not become the law of the case so as to preclude this Court from

changing it before final judgment. Kuiken v. Garrett, 51 NW2d 149, 154 (Iowa 1952); Cowman v. LaVine, 234 NW2d 114, 124 (Iowa 1975); In re Hutchinson's Estate, 121 NW2d 501, 506 (Iowa 1963). Those experts are not present, and there has been no showing that they will be present this week to testify in accordance with the trial setting. This violates not only the spirit but also the intent of the Court's April 21, 1986 Order. This is yet another example of the flagrant disregard of Court Orders, and another ploy to avoid this trial. The Defendants have once again urged that their motions for sanctions to exclude the expert testimony of these three doctors be granted. The Court agrees, and hereby orders that such expert testimony shall not be allowed.

The final and ultimate sanction to be imposed is the dismissal of the Petition with prejudice. The facts and circumstances set forth in this Order, and reflected in the Court file give this Court no other alternative. The Defendants by their motions, affidavits, and their appearance on the morning of trial have expressed the prejudice to which they have been subjected. The record reflects that there is only $100,000.00 in insurance coverage, and the Petition as originally filed sought $2,000,000.

Finally, the Defendants have offered as a part of this record the exhibits designated in their settlement conference compliance statement. Those Defendants' Exhibits A through J as indentified (sic) in Defendants' Exhibit List are admitted into evidence since no objections were filed by Plaintiff in accordance with the April 19, 1986 Order. Further no objections were made at the time of the Defendants' offer.

The Plaintiff has not submitted an exhibit list as required by the April 19, 1986 Order and under District Court

Rule 7.1B. Therefore, the Court can not rule on Plaintiff's Exhibits, if any, pursuant to the sanction motion.

The exhibits offered by Defendants include the evidentiary deposition of the treating neurosurgeon Neal F. Kassell. Dr. Kassell is of the opinion that within a reasonable degree of medical certainty the chiropractic adjustment administered by Defendant Warren Rhodes to the Plaintiff in the Palmer College clinic had no causal connection to the rupturing of the congenital arteriovenous malformation.

For the reasons set forth herein and contained in the Court file, sanctions under Iowa Rule of Civil Procedure 134 are granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Dr. Kaplan, Dr. Quinlan, and Dr. Ward are precluded from offering expert opinion testimony.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff Bonnie Krugman's Petition is hereby dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the cost of this action are taxed to the Plaintiff Bonnie Krugman.

Dated this 28th day of April, 1986.

/s/ Edward B. deSilva
Judge of the Seventh
Judicial District

IN THE IOWA DISTRICT COURT FOR
SCOTT COUNTY

BONNIE KRUGMAN,

Plaintiff,

vs.

PALMER COLLEGE OF CHIROPRACTIC, et al

Defendants

FILED

1986 MAY 27 AM 9:50

MARLENE K. NELSON
CLERK OF DISTRICT COURT
SCOTT COUNTY, IOWA

LAW NO. 66572

RULING ON MOTION TO VACATE DISMISSAL ORDER AND ORDER OF SANCTIONS OF APRIL 28, 1986

On May 23, 1986 the above Motion filed by the Plaintiff comes on for hearing, said Motion asking that this Court vacate its previous order of dismissal and sanctions entered on April 28, 1986 and to reschedule this matter for trial, together with entry of pretrial order setting forth reasonable cutoffs for the completion of all discovery, evidence depositions and filing of all pretrial submissions and scheduling a final pretrial.

This court is not sure as to what Code section the Motion is filed under. There is no specific statement as to what rule of Civil Procedure the Plaintiff is filing under, but upon examination of Plaintiff's counsel it was determined that Rule 244 and 252 were the rules under which this Motion was filed. If filed under Rule 252 and 253 the Court is not informed as to what the grounds were for the filing of said Motion, although the body of the Plaintiff's Motion certainly sets forth the basis.

If filed under 244 there also are some procedural requirements, in that Rule 244 again must specify the grounds for the request, and it must be done in accordance with the subsection of said Iowa rule. However, again, the Motion filed by the Plaintiff contains the language and statements which the Court feels are setting forth the Plaintiff's position, and the ruling will be made as if this matter was filed alleging a ground under either 252 or 244 of the Iowa Rules of Civil Procedure, and for all purposes is considered by this Court as if properly filed.

This Court having examined the statements and allegations made in the Motion and examined the affidavit filed in support thereof on May 23rd by the Plaintiff and having heard the arguments of counsel at this time denies the Plaintiff's Motion moving this Court vacate its previous order of dismissal and sanctions entered on April 28, 1986; and because of this ruling, it is not necessary for this Court to reschedule this matter for trial or any additional pretrial orders.

It is therefore ORDERED, ADJUDGED and DECREED that the Motion to Vacate Dismissal Order and Order of Sanctions of April 28, 1986 filed by the Plaintiff be and the same is hereby denied.

Dated this 25th day of May, 1986.

/s/ Edward B. deSilva
Judge of the Seventh Judicial
District of Iowa